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**MINUTES**  
**FRIDAY – JANUARY 31, 2003**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:05 a.m., on Friday, January 31, 2003, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Kim Lacey, Dr. Garon Smith, Ward Shanahan, and Russ Hudson (via telephone)

Board Members Absent: none

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Theresa A. Strauch for Hendrickson's Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Lisa Peterson, Public Affairs Coordinator, Director's Office (DIR); John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Jim Madden, Legal, DIR; Claudia Massman, Legal, DIR; Judy Hanson, Permitting & Compliance Division (PCD); Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), PCD; Brian Heckenberger, WPB, PCD; Tom Reid, WPB, PCD; Theresa Blazicevich, WPB, PCD; Jon Dilliard, Chief, Community Services Bureau (CSB), PCD; John Arrigo, Administrator, Enforcement Division (ENF); Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Abe Horpestad, Resource Protection Bureau (RPB), PPAD; Chris Levine, RPB, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Sarah Carlson, Montana Association of Conservation Districts; Rex Mongold, Tongue River Farm; Donna Rise, MDA; James Bauder, Irrigators/Montana State University; Marc Catellier, Northern Plains Resource Council; Dan Dutton, self

## Agenda

Chairman Russell briefly explained that the Board was going to try to get through as much of the agenda as possible prior to the public hearing on numeric water quality standards.

### I. ADMINISTRATIVE ITEMS

#### A. Review and Approve Minutes

1. Review and approve minutes of December 6, 2002 meeting.

Chairman Russell introduced the item and asked for comments. Hearing none, Ms. Lacey MOVED to APPROVE the minutes of the December 6, 2002 meeting. Dr. Garon SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. Review and approve minutes of December 13, 2002 teleconference meeting.

Chairman Russell introduced the item. Mr. Fishbaugh MOVED to APPROVE the minutes. Dr. Smith SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

### II. ACTION ITEMS

#### A. Repeal, Amendment or Adoption of Final Rules

1. In the matter of the amendment of DEQ Circular WQB-7 to include a human health standard for Bromoxynil and amendment of ARM Title 17, Chapter 30, sections 502, 619, 702, 715, 1001, 1006 and 1007, which refer to WQB-7.

Chairman Russell introduced the item and inquired if someone from the Department was going to speak to the item. Mr. Shanahan asked if someone from the Department could explain what Bromoxynil does. Mr. Levine, on behalf of the Department, explained that it is an herbicide that can be used for annual grasses.

Chairman Russell called for a motion to ADOPT the rule changes and to accept the presiding officer reports, the public comments, and the 311 and 521 analyses. Ms. Lacey so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. In the matter of the adoption of new rules I-X pertaining to storm water discharges.

Chairman Russell introduced the item. Ms. Lovelace, on behalf of the Department, responded to questions. She concurred with Chairman Russell that this rule would allow for the regulation of smaller communities in the wastewater area. Ms. Lovelace further stated that these rules capture the entire storm water program.

Discussion continued, covering the stakeholders group and smaller communities. Also discussed was the involvement of the Montana Department of Transportation.

Chairman Russell called for a motion to ADOPT the rules, accept the presiding officer's report, and adopt the 311 and 521 analyses. Mr. Shanahan so MOVED. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

3. In the matter of the amendment of ARM 17.30.1301, 17.30.1303, 17.30.1304, 17.30.1322, 17.30.1323, 17.30.1341, 17.30.1351 and 17.30.1361, and the repeal of ARM 17.30.1332 pertaining to Montana Pollutant Discharge Elimination System Permits.

Chairman Russell introduced the item. Hearing no questions, he called for a motion to AMEND the rules and to accept the presiding officer's report and the 521 and 311 analyses. Mr. Hudson so MOVED. Dr. Smith SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

4. In the matter of the adoption of new rules I through IX and the repeal of ARM 17.36.901 through 17.36.910 pertaining to Subsurface Wastewater Treatment Systems.

Chairman Russell introduced the item and, upon request of Ms. Brooke, asked Ms. Lovelace to provide a summary. Ms. Lovelace explained that these rules are the regulations adopted under the Water Quality Act for sanitation sewage management used by counties. She also explained how the rules would affect existing systems.

Discussion commenced regarding certain comment letters that were received. Ms. Blazicevich, on behalf of the Department, responded to specific questions about the comment letters. A more in-depth discussion took place regarding percolation testing.

Upon conclusion of the discussion, Chairman Russell called for a motion to ADOPT the rules, the public comments and responses, the presiding officer's report and the 521 and 311 analyses. Ms. Lacey so MOVED. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

5. In the matter of the amendment of ARM 17.38.101 and 17.38.106 to incorporate the 2002 version of Circular DEQ-4 (standards for on-site subsurface wastewater systems) and to replace outdated references to "WQB" with "DEQ."

Chairman Russell introduced the item. Mr. Shanahan mentioned a paper written by Jack Sanford regarding gravel lakebeds. Ms. Blazicevich responded. She provided details of the research conducted, stating that while they know a lot about bacteria, they don't have really good data on viruses, trace metals and some other constituents.

Chairman Russell called for a motion to ADOPT the rule changes, the presiding officer's report, the public comments and responses, and the 311 and 521 analyses. Ms. Lacey so MOVED. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

#### B. Initiation of Rulemaking and Appointment of Hearing Officer

The next item on the agenda was a proposal to amend the human health standards for arsenic and total trihalomethane in DEQ Circular WQB-7 and amend the rules where WQB-7 is incorporated by reference to reflect the correct version date.

Mr. Livers stated that the Department wanted to withdraw this request due to some timing issues with arsenic. Mr. Compton explained it was learned that the federal requirements would not go into effect until 2006 and that the Department did not want to get ahead of the federal requirements.

Discussions continued, covering the frequency of changes to WQB-7 and the difficulty in obtaining copies of it for the public. Mr. Hudson pointed out that the arsenic standards were passed in the final days of the Clinton administration. He also spoke of a small community near him in Arizona where the water supply company had bought reverse-osmosis systems for every household user, because it was cheaper than putting in a treatment plant for arsenic. He said that while it was a cheaper solution, it was not a cheap solution.

Mr. Dilliard, on behalf of the Department, responded to the financial issues raised. He also addressed issues of arsenic in Montana and the amount of it that might be naturally occurring.

#### C. New Contested Cases

1. In the matter of Northern Line Layers, Inc.'s (BER 2002-13 OC) request for a hearing to appeal a DEQ notice of violations, order of abatement, and proposed civil penalty under the Opencut Mining Act.

Mr. Bowe provided an update to the Board and explained that it was appropriate for the Board to appoint him as permanent hearing examiner or that the Board could decide to hear the matter.

Mr. Shanahan MOVED to APPOINT Mr. Bowe as the hearings officer in this matter. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. In the matter of the request of ExxonMobil Refining & Supply Co. (BER 2003-01 WQ) for a hearing on its MPDES permit.

Mr. Bowe explained that a Virginia attorney submitted the Company's response to the first prehearing order. He also stated that the Montana Supreme Court requires that a lawyer who is admitted to practice law in Montana represent corporations at contested case hearings; therefore, he had issued an order instructing ExxonMobil to comply with the rules of the Montana Supreme Court. Mr. Bowe informed the Board that they could appoint him as permanent hearing examiner or decide to hear the matter.

Ms. Brooke MOVED to APPOINT Mr. Bowe as the permanent hearing examiner. Ms. Lacey SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

### III. BRIEFING AGENDA ITEMS

#### A. Contested Case Update

1. Cases assigned to Hearing Officer Kelly O'Sullivan

- a. Town of Geraldine, MPDES Permit No. MT-002-0826

Ms. O'Sullivan explained that new information had been presented, which may support the designation of the drainage as ephemeral. If this could be confirmed, the permit could be modified and the case would be over. If this could not be confirmed, then they would have to go through reclassification, which could take up to six months.

- b. Classical Gas, BER 2002-12 UST

Ms. O'Sullivan stated that a prehearing conference was scheduled for March 4 and a hearing was scheduled for March 18.

- 2. Cases assigned to Hearing Officer Tom Bowe

- a. M&W Investments, Inc., EQ #01-1457 and 00-1822

Mr. Bowe stated he had nothing to add to the language in the agenda.

- b. Van Dyke Construction Company, Inc. and Loughmiller Reclamation, L.L.C., BER 2002-07 OC

Mr. Bowe informed the Board that he had issued an extension to February 5 for the parties to submit settlement documents and that at the March meeting there should either be a settlement or an update on the hearing schedule.

- c. CR Kendall Corporation, BER 2002-09 MM

Mr. Bowe informed the Board that the parties have been granted several requests for extensions of time, the latest of which was to expire today, to see whether the case would be settled or whether they'd agree on a schedule.

- d. Sterling Mining Company, BER 2002-01 AQ

Mr. Bowe stated that he had conducted teleconferences on January 17 and 24, and that the hearing was scheduled for February 28. He said it's likely that either the Board would have a proposed decision to review at the end of March, or that the case would settle.

- e. Westmoreland Resources, Inc., BER 2002-04 MSUMRA

Mr. Bowe stated he had nothing to add to the summary that was given on the agenda.

- f. Derek Brown Construction, Inc., BER 2002-10 ASB

Mr. Bowe stated that the company had filed a motion to add parties and that on January 29 he had issued a proposed decision that the motion to add parties be denied. He added that the Board would have an opportunity to agree or disagree with his proposed decision in March.

- 3. Cases in litigation

- a. Pompeys Pillar Historical Ass'n v. DEQ, 2002 MT 352

Mr. Bowe summarized the statement in the agenda about this Supreme Court Case.

Recess: At 10:00 a.m., Chairman Russell called a recess until the 11:00 a.m. hearing on numeric water quality standards. The meeting would resume at the conclusion of the hearing for the purpose of adjourning.

#### IV. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Mr. Shanahan so MOVED. Ms. Lacey SECONDED the motion. A VOTE was taken and the meeting ADJOURNED at 4:35 p.m.

Board of Environmental Review January 31, 2003, Minutes Approved:

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

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DATE